Supreme Court, U.S.
FILED

No. 1

07-973 JAN 8 4 2008

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In The
Supreme Court of the United States

OFFICE OF THE CLERK

DEBORAH KAY PARKER,

Petitioner,

v.

LEE EDWARD CUMMING; JIM BASS FORD; AND FORD MOTOR COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS AT EASTLAND

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals for the Eleventh District of Texas at Eastland err when it concluded that the Bankruptcy Court could not have exercised jurisdiction over Parker's suit and that as a result, the filing of the Plaintiff's Original Petition in Bankruptcy Court was an "intentional disregard of jurisdiction" so that the statute of limitations expired?

LIST OF ALL PARTIES TO THE PROCEEDING

The names of all the parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this case. To the best of the Petitioner's knowledge, none of the parties has a parent company or non-wholly owned subsidiary involved in this suit, and if they do the acts and/or omissions of the parent and/or non-wholly owned subsidiary are in no way implicated by this case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF ALL PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

PLEADINGS, OPINIONS AND ORDERS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 5

Statement of the Facts 5

Proceedings Below 6

Basis for Federal Jurisdiction in the Court of First Instance 7

ARGUMENT 8

I. FINDING THAT THE BANKRUPTCY COURT LACKED JURISDICTION TO HEAR PARKER'S SUIT, AND THEREFORE HER SUIT WAS FILED WITH INTENTIONAL DISREGARD TO THE COURT'S LACK OF JURISDICTION, IS INCORRECT 8

What the Court of Appeals Held 8

Jurisdiction of the Bankruptcy Court Generally 9

Bankruptcy Jurisdiction Over "Related To" Matters 10

The Only Limitation on Bankruptcy Court Jurisdiction is the Bankruptcy Court Cannot Conduct a Jury Trial without consent of the parties, and specific authority of the U. S. District Court 11

II. THE DOCTRINE OF COMITY IS APPLICABLE 12

Constitutional Import of the Court of Appeals' Error 14

CONCLUSION 15

APPENDIX

Opinion of
The Eleventh Court of Appeals of Texas
entered February 22, 2007 ..... 1a

Order of
The 385th District Court of
Midland County, Texas
Re: Granting Defendant's Motion for
Summary Judgment
entered July 27, 2005 ..... 14a

Order of
The United States District Court for the
Western District of Texas Austin Division
Re: Granting Defendant's Motion to Dismiss
entered September 8, 2004..... 17a

Order of
The United States Bankruptcy Court for the
Western District of Texas
Re: Denying Plaintiffs' Motions to Dismiss
entered March 15, 2004..... 19a

Order of
The United States District Court for the
Western District of Texas Austin Division
Re: Dismissing Adversary Proceeding
entered April 2, 2003 ..... 27a

Order of
The Supreme Court of Texas
Re: Denying Motion for Rehearing
entered October 26, 2007 ..... 29a

Plaintiff's Original Petition
(Automobile Accident)
filed October 29, 2004 ..... 30a

Plaintiff's Original Complaint
filed April 11, 2003 ..... 38a

Plaintiff's Original Complaint
filed January 24, 2003 ..... 51a

TABLE OF AUTHORITIES

Page(s)

CASES

Bridas Corp. v. Unocal Corp.,
16 S.W.3d 887
(Tex. App. Houston [14th Dist.] 2000) 13

Bryant v.
United Shoreline Inc. Assur. Servs., N.A.,
972 S.W.2d 26 (Tex. 1998) 13

Celotex Corp. v. Edwards,
514 U.S. 300 (1995) 10

Christensen v. Integrity Ins. Co.,
719 S.W.2d 161 (Tex. 1986) 13

Coca-cola Co. v. Harmar Bottling Co.,
218 S.W. 3d 671 (Tex. 2006) 13

Gannon v. Payne,
706 S.W.2d 304 (Tex. 1986) 13-14

Griffith v. Oles (Matter of Hipp, Inc.),
895 F.2d 1503 (5th Cir. 1990) 9

Howell v. Mississippi,
543 U.S. 440 (2005) 2, 7

In re ACR Mgmt., L.L.C.,
329 B.R. 142 (Bankr. W.D. Pa. 2005) 12

In re Dow Corning Corp.,
211 B.R. 545 (Bankr. E.D. Mich. 1997) 12

In re Prescription Home Health Care, Inc.,
316 F.3d 542 (5th Cir. 2002) 10

In re UAL Corp.,
310 B.R. 373 (Bankr. N.D. Ill. 2004) 12

K.D.F. v. Rex,
878 S.W.2d 589 (Tex. 1994)..... 13

Kadel v. Thompson,
84 B.R. 878 (N.D. Ga. 1988)..... 12

Parker v. Cumming,
216 S.W.3d 905, *cert. filed*..... 1, 8, 9, 10

Oregon v. Guzek,
546 U.S. 517 (2006) 2, 7

STATUTES

11 U.S.C. § 151 7

11 U.S.C. § 157(b)(5) 6

28 U.S.C. § 151 ..... 3, 9, 13

28 U.S.C. § 157 3

28 U.S.C. § 157(a)..... 11

28 U.S.C. § 157(b)(1) 11

28 U.S.C. § 157(b)(5) 10, 11, 12

28 U.S.C. § 157(c)(1) 11

28 U.S.C. § 157(c)(2) 11

28 U.S.C. § 157(e) 11

28 U.S.C. § 1257(a) 2, 7

28 U.S.C. § 1334 2

28 U.S.C. § 1334(b) 10

28 U.S.C. § 1411 11

Tex. Civ. Prac. & Rem. Code § 16.064 ..... 4, 6, 14

RULES

Sup. Ct. R. 29.4(b) 2

Sup. Ct. R. 29.4(c) 2

PLEADINGS, OPINIONS AND ORDERS BELOW

Parker, a Chapter 7 Bankruptcy Debtor, filed a personal injury lawsuit in the United States Bankruptcy Court for the Western Division of Texas, Austin Division, on January 24, 2003. Appendix at 51a. Parker's original suit was dismissed by the United States Bankruptcy Court for the Western District of Texas on April 2, 2003. Appendix at 19a. Parker refiled her suit in the District Court for the Western District of Texas on April 11, 2003. Appendix at 38a. Motions to dismiss filed by the Defendants based on the Statute of Limitations were denied by the U. S. District Court on March 15, 2004. Appendix at 19a. The Bankruptcy case was administratively closed on April 19, 2004. Accordingly, the District Court lost jurisdiction, so this second suit was dismissed from the United States District Court on September 8, 2004. Appendix at 17a. Parker thereafter timely refiled her suit in state court under the applicable Texas statutues. Appendix at 30a. However, on motion for summary judgment, the Midland Trial Court found that the statute of limitations had expired. Appendix at 14a. Upon timely perfected appeal, the opinion at issue from the Court of Appeals for the Eleventh District of Texas at Eastland in *Parker v. Cumming,* 216 S.W.3d 905 (Tex. App. — Eastland, pet. denied), *cert. filed*, was issued on February 22, 2007. Appendix at 1a. The Texas Supreme Court refused to consider the case. Appendix at 29a.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals for the Eleventh District of Texas at Eastland sought to be reviewed was decided on February 22, 2007. Parker's request that the Texas Supreme Court review the decision was denied on September 7, 2007 and her Motion for Rehearing was denied on October 26, 2007. App. at 29a. There has been no order granting an extension of time to file a petition for writ of certiorari. There has been no cross-petition for writ of certiorari filed. This Court has jurisdiction to review this decision because it is a final decree rendered by the highest state court in which a decision could be had, and it presents a question of federal law on which the decision is based. 28 U.S.C. 1257(a); *Oregon v. Guzek*, 546 U.S. 517, 521 (2006); *Howell v. Mississippi*, 543 U.S. 440, 443 (2005). This case does not require notification under Sup. Ct. R. 29.4(b) or (c).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

28 U.S.C. § 1334 provides, in relevant part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other

> than the district courts, the district courts shall have original and not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11 ...

28 U.S.C. § 151 provides:

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 157 provides, in relevant part:

> (a) Each district court may provide that any or all cases under chapter 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11,

> referred to under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title. ...
>
> (b)(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose, as determined by the district court in which the bankruptcy case is pending. ...
>
> (c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. ...

Tex. Civ. Prac. & Rem. Code § 16.064 provides:

> (a) The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:
>
> > (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceedings; and

> (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.
>
> (b) This section does not apply if the adverse party has shown in abatement that the first filing was made with intentional disregard of proper jurisdiction.

STATEMENT OF THE CASE

Statement of the Facts

On January 24, 2001, Parker took her car to her local Ford dealer for brake repairs. Despite being assured it would be repaired the same day, when she returned at the end of the day she learned no work had been done on her car. Her car was her sole means of getting from home to work, and so she took it back despite the work not being done.

Soon after leaving a truck suddenly stopped in front of her. Parker applied her brakes but they failed, and she hit the truck. Parker was then, in turn, rear-ended by another vehicle. Parker timely elected to bring suit to recover for the serious personal injuries she suffered against a number of defendants, including the dealership and the other driver.

Proceedings Below

Because she was then a Chapter 7 Debtor in bankruptcy, Deborah Parker's personal injury lawsuit against the Defendants was initially filed in federal bankruptcy court. Appendix at 51a. Paragraph two of this pleading specifically referred to, and quoted the provisions of 11 U.S.C. § 157(b)(5) asking for a trial in District Court. The Bankruptcy Court, refusing to transfer the case for jury trial, instead dismissed the case for lack of jurisdiction. Appendix at 19a. Parker timely refiled her suit in the federal district court. Appendix at 38a. Thereafter, the Defendants filed motions to dismiss based on claims that the statute of limitations had expired, but the United States District Judge denied those motions. Appendix at 19a, page 5. The bankruptcy case was administratively closed on March 19, 2004, thereby depriving the U. S. District Court of jurisdiction, so the suit was then dismissed by the U. S. District Court on September 8, 2004. Appendix at 17a. Parker then timely filed (within the 60 days provided by Texas Civil Practice and Remedies Code 16.064) suit in Texas state district court. Appendix at 30a. Defendants filed motions for summary judgment, asserting among other claims, their claims based on the same statute of limitations argument denied in U. S. District Court (Appendix at 19a). This time, however, the State District Court granted the motions previously denied in Federal Court. Appendix at 1a. Ms. Parker appealed to the Texas 11th Court of Appeals which affirmed the dismissal. Appendix at 29a. Ms. Parker timely filed her Petition for Review with the Texas Supreme Court. The Texas Supreme Court

refused to hear the matter, (Appendix at A-10), and Ms. Parker now seeks writ of certiorari from the Court.

Notwithstanding express recognition by the Court of Appeals that filing in the District Court was acceptable (Appendix 9, page 4), and express Federal law stating that a Bankruptcy Court is a unit of the United States District Court (11 U.S.C. § 151), the 11th Court of Appeals found that filing the suit in bankruptcy court was done in intentional disregard of jurisdiction, thereby allowing the statute of limitations to expire.

Basis for Federal Jurisdiction in the Court of First Instance

Because this case began in the state courts, this Court is the first federal court to exercise jurisdiction over this matter, and such jurisdiction is conferred by 28 U.S.C. § 1257(a). This Court has jurisdiction to review this decision because it is a final decree rendered by the highest state court in which a decision could be had, and it presents a question of federal law on which the decision is based. 28 U.S.C. 1257(a); *Oregon v. Guzek*, 546 U.S. 517, 521 (2006); *Howell v. Mississippi*, 543 U.S. 440, 443 (2005).

ARGUMENT

I. FINDING THAT THE BANKRUPTCY COURT LACKED JURISDICTION TO HEAR PARKER'S SUIT, AND THEREFORE HER SUIT WAS FILED WITH INTENTIONAL DISREGARD TO THE COURT'S LACK OF JURISDICTION, IS INCORRECT.

The Court of Appeals held that Parker's case was not timely filed, a determination based on its finding that filing her suit in the Bankruptcy Court did not toll limitations. This finding was, in turn, based on a finding that the Bankruptcy Court had no jurisdiction to consider Parker's suit, which is incorrect.

What the Court of Appeals Held

In order to understand why the Court of Appeals' conclusion was incorrect, it is first necessary to understand what it held.

The Court of Appeals began by correctly recognizing the case turned on whether filing suit in the Bankruptcy Court and the United States District Court tolled limitations: if it did, summary judgment on limitations was improper, and if it did not, Parker's suit was time barred. *Parker*, 216 S.W.3d at 909. In deciding this issue, the Court of Appeals began by rejecting the argument made by one of the Respondents that jurisdiction lay only in the state court, correctly finding the United States District Court also had jurisdiction. *Id.* at 909 n. 1. This

leaves only the question of whether the Bankruptcy Court could have exercised jurisdiction over Parker's personal injury case.

In finding it could not, the Court of Appeals held Parker's pleading "affirmatively establishes that the bankruptcy court did not have jurisdiction." *Id.* It based this conclusion on its finding that the suit was not a "core" proceeding under the Bankruptcy Code, but rather merely "related to" Parker's bankruptcy case. *Id.* It then went on to find Bankruptcy Courts can never entertain personal injury lawsuits, *Id.* at 910-11, and because this is settled law Parker should have known this. *Id.* at 911. Because she should have known this, the Court of Appeals ultimately held Parker's suit was filed with intentional disregard of proper jurisdiction, and so limitations on her claims were not tolled under Texas law. *Id.* at 912-13.

The problem with this ruling is the Court of Appeals' understanding of the scope of the jurisdiction of the Bankruptcy Court is incorrect.

Jurisdiction of the Bankruptcy Court Generally

All bankruptcy courts are a "unit" of the district court in whose district they sit, 28 U.S.C. § 151, and operate in a manner analogous to a magistrate judge. *Griffith v. Oles (Matter of Hipp, Inc.)*, 895 F.2d 1503, 1514 (5th Cir. 1990). By statute, United States District Courts have "original but not exclusive jurisdiction" over all civil proceedings that are either "arising under" or

"related to" the Bankruptcy Code. 28 U.S.C. § 1334(b). This is the basis of the Court of Appeals' (correct) finding on that the United States District Court had jurisdiction to hear Parker's case. *Parker*, 216 S.W.3d at 909 n. 1.

Where the Court of Appeals slipped into error was when it went on to find the jurisdiction the United States District Court had was denied to its "unit," the Bankruptcy Court, by 28 U.S.C. § 157(b)(5).

Bankruptcy Jurisdiction Over "Related To" Matters

This is error because it misinterprets the express language of Section 157(b)(5). As set forth above, United States District Courts have jurisdiction of claims that relate to a bankruptcy case. A matter is "related to" a bankruptcy case if its resolution can have any conceivable effect on the debtor's estate. *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995); *In re Prescription Home Health Care, Inc.*, 316 F.3d 542, 547 (5th Cir. 2002). Because Parker's suit could result in an increase in the size of her bankruptcy estate, it is at least "related to" her bankruptcy case, and therefore subject to the jurisdiction of the United States District Court.

Because the United States District Court has jurisdiction, the Bankruptcy Court also has jurisdiction. By statute, all cases affecting a bankrupt debtor (whether they be core, arising under or related to the bankruptcy) are to be heard

by the Bankruptcy Court. 28 U.S.C. §§ 157(b)(1) (vesting Bankruptcy Courts with jurisdiction to hear core or "arising in" proceedings), 157(c)(1) (vesting Bankruptcy Courts with jurisdiction to hear a "related to" proceeding); *accord*, 28 U.S.C. § 157(a).

The Only Limitation on Bankruptcy Court Jurisdiction is the Bankruptcy Court Cannot Conduct a Jury Trial without consent of the parties, and specific authority of the U. S. District Court.

The provisions of Section 157(b)(5) of the Bankruptcy Code do not change this analysis. Although this section does provide that personal injury matters must be "tried in the district court," the fact is, a jury trial can occur in the Bankruptcy Court. 28 U.S.C. § 1411 provides that being in bankruptcy does not deprive a debtor of the right to jury trial. 28 U.S.C. § 157(c)(2) allows all proceedings in a case to be referred to the Bankruptcy Court with the consent of the parties. To further clarify that a jury trial may be had in Bankruptcy Court, 28 U.S.C. § 157(e) states a jury trial may be held in the Bankruptcy Court with the consent of the parties, and specific authority of the U. S. District Court. A fair interpretation of the authority of a Bankruptcy Court, when considered in light of this additional statutory authority, is that the Bankruptcy Court has jurisdiction to hear non-trial matters in the related-to case. Put more simply, the Court of Appeals erred in finding Bankruptcy Courts have no jurisdiction over claims like Parker's — in fact, they have jurisdiction to do everything but try the case before a jury, and, in

actuality, they can even try the case before a jury if the provisions for consent and specific authority are met.

Other courts recognize this, finding that Bankruptcy Courts can handle all aspects of a personal injury claim save and except for the trial, and rejecting the claim that 28 U.S.C. § 157(b)(5) divests them of this jurisdiction. *In re ACR Mgmt., L.L.C.*, 329 B.R. 142, 143-44 (Bankr. W.D. Pa. 2005); *In re UAL Corp.*, 310 B.R. 373, 379-83 (Bankr. N.D. Ill. 2004); *accord*, *In re Dow Corning Corp.*, 211 B.R. 545, 561 (Bankr. E.D. Mich. 1997) (parties could waive their right to insist the trial be held in the United States District Court and have the matter determined by the Bankruptcy Court; holding could not be correct if Bankruptcy Court lacked jurisdiction to act); *see also Kadel v. Thompson*, 84 B.R. 878, 879-80 (N.D. Ga. 1988) (considering whether Section 157(b)(5) requires courts to try personal injury case filed as adversary proceedings in a bankruptcy case; ultimately concluding it could abstain from doing so, but raising no objection to the manner the case came to be before the court).

II. The Doctrine of Comity is Applicable.

The same motion to dismiss and the same argument that the filing in Bankruptcy court was in "intentional disregard" of the proper jurisdiction was raised by the Defendants in the U. S. District Court, while it properly had jurisdiction, as recognized by the opinion of the 11th Court of Appeals. The District Court denied those motions based on the

same pleadings that the Court of Appeals used to find "intentional disregard".

Both the application of 28 U.S.C. § 151, and the contents of the order of Judge Yeakel (Appendix 4, page 5) seem to fall under the doctrine of comity. Comity is a doctrine of law under which the courts of one jurisdiction give effect to the laws of another jurisdiction not as a rule of law, but rather out of deference or respect. *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 887, 892 (Tex. App. Houston [14th Dist.] 2000, writ dism'd w.o.j.). The 11th Court of Appeals should have given deference to the provisions of 28 U.S.C. § 151, and should have given effect to the order of Judge Yeakel when he addressed the exact same issue and claim of Defendants in his court (dismissal based on statute of limitations, and intentional disregard of jurisdiction).

Generally, it is appropriate for courts to apply the comity doctrine where another court has exercised jurisdiction over the matter and where the states agree about the public policy at issue. *Bryant v. United Shoreline Inc. Assur. Servs., N.A.*, 972 S.W.2d 26, 30 (Tex. 1998). Comity is a doctrine based on cooperation and mutuality. *K.D.F. v. Rex*, 878 S.W.2d 589, 593 (Tex. 1994). In the state court context, the issue of comity usually arises between states. See, e.g. *Coca-cola Co. v. Harmar Bottling Co.*, 218 S.W. 3d 671, 697 (Tex. 2006) (holding comity generally arises when there is litigation in parallel state litigation); *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, 163 (Tex. 1986) (holding comity prevented Texas court from enjoining similar California litigation); *Gannon v. Payne*, 706 S.W.2d

304, 307 (Tex. 1986) (holding comity prevented Texas court from enjoining related Canadian litigation).

In this case, U. S. District Judge Judge Lee Yeakel exercised jurisdiction and issued a ruling. The Defendants then presented the same claim in the state district court which reversed Judge Yeakel's order finding jurisdiction, and applying the same statute (Texas Civil Practice and Remedies Code 16.064), but the state trial court granted the same motion based on the exact same facts, which was affirmed by the Court of Appeals.

The Court of Appeals found that Judge Yeakel had jurisdiction, but declined to give effect in state court to his prior order on the same motion and fact situation. Had the Court of Appeals applied the doctrine of comity, and applied either the specific provisions of federal law, or the specific findings of Judge Yeakel's order, Ms. Parker would be allowed into court.

Constitutional Import of the Court of Appeals' Error

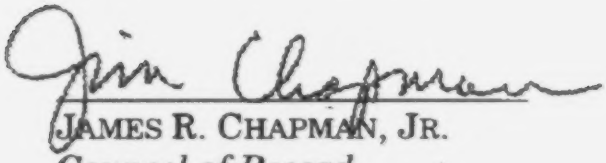
Narrowly, the Court of Appeals' error in finding the law clearly deprives the Bankruptcy Court of jurisdiction over Parker's claims implicates only a Texas state law, and a single litigant, in that it means Parker is unable to take advantage of a provision of state law extending the time available to her to file her lawsuit against the Respondents. However, more broadly, the impact of the Court of Appeals' error extends far beyond this lawsuit and

Ms. Parker. The 11th Court of Appeals, a Texas State Court, has made an incorrect finding, and published a binding opinion depriving Ms. Parker of her constitutional rights of access to the Courts with their statement of law about the jurisdiction of federal bankruptcy courts. Bankruptcy law is exclusively federal law, and determinations of the jurisdiction of a bankruptcy court are (and should be) exclusively the perogative of federal courts. More importantly, this incorrect statement was made regarding the jurisdiction of the Bankruptcy Courts, an issue that is already hard enough to determine. The decision constitutes precedent directly contrary to existing federal precedent and the provisions of black letter federal law. Finally, the ruling of the 11th Court of Appeals effectively acts as a de facto appeal of a federal court ruling, and reverses the prior ruling of a federal court finding it had jurisdiction in the same case, between the same parties, in the same lawsuit. This is a de facto and de jure exercise of state court jurisdiction over a federal district court, which is disallowed under our legal system. For all these reasons the Court should grant this Petition and find the Court of Appeal's understanding of the jurisdiction of the Bankruptcy Court is incorrect.

CONCLUSION

For all of the foregoing reasons, the Petitioner requests this Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX

Opinion filed February 22, 2007

In The

Eleventh Court of Appeals

No. 11-05-00380-CV

DEBORAH KAYE PARKER, Appellant

V.

LEE EDWARD CUMMING, JIM BASS FORD AND FORD MOTOR COMPANY, Appellees

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On Appeal from the 385th District Court

Midland County, Texas

Trial Court Cause No. CV45175

OPINION

Deborah Kaye Parker filed suit seeking personal injury damages arising out of an automobile accident. Parker's suit was filed more than two years after the accident, but she alleged that litigation previously filed in bankruptcy and federal district courts had tolled limitations. The trial court found that the tolling provision did not apply and granted defendants' motions for summary judgment. We affirm.

I. *Background Facts*

Parker was involved in a three-car accident on January 27, 2001. On January 24, 2003, she filed suit against Lee Edward Cumming; Society of St. Vincent De Paul; Catholic Diocese of Midland, Texas; Jim Bass Ford; Mercury Automobile Company; and Dr. Joe Wilkinson. Parker had previously filed for Chapter 7 bankruptcy protection, and she filed her suit as an adversary proceeding in her bankruptcy case. Parker alleged that the adversary proceeding was a core proceeding, that each defendant was negligent, that their negligence was the proximate cause of her injuries, and that each was jointly and severally liable for her injuries. Parker's complaint requested that the litigation be transferred to U. S. District Court for jury trial.

Approximately two weeks later, the bankruptcy court entered an order that required Parker to show cause why her adversary suit should not be dismissed for lack of jurisdiction. Parker responded with a separate motion to transfer the litigation to district court. The bankruptcy court determined that it lacked jurisdiction to hear or transfer Parker's personal injury suit and dismissed the adversary proceeding.

Parker then filed suit in U.S. District Court against the same defendants and asserted the same causes of action. She later dismissed her claims against Dr. Wilkinson. The remaining defendants filed motions to dismiss for failure to state a claim, and Ford Motor Company filed a motion to dismiss for lack of subject-matter jurisdiction. The district

court initially denied the motions to dismiss, but when Parker's bankruptcy case was closed, the court dismissed the suit for lack of subject-matter jurisdiction.

Parker then filed suit in state court against the remaining defendants and asserted the same claims originally asserted in the adversary proceeding. The defendants filed a motion for summary judgment arguing that Parker's claims were barred by limitations because the state court suit was filed more than two years after the accident and because Parker's adversary proceeding did not toll limitations. Parker responded that TEX. CIV. PRAC. & REM. CODE ANN. § 16.064 (Vernon 1997) tolled limitations because her adversary proceeding and federal district court litigation were not filed with intentional disregard of proper jurisdiction and each subsequent suit was filed within sixty days of the dismissal of the preceding one. The trial court disagreed and granted defendants' summary judgment motion.

II. *Issues*

Parker challenges the trial court's decision with a single issue, contending that summary judgment was inappropriate because there was no evidence that she was guilty of intentional disregard of proper jurisdiction.

III. *Was Summary Judgment Proper?*

The key facts are undisputed. The issue is the effect of Parker's decision to file an adversary

proceeding that the bankruptcy court determined it had no jurisdiction to consider.

A. Standard of Review.

The standard of review for traditional summary judgments is well recognized. We must consider the summary judgment evidence in the light most favorable to the nonmovant, indulging all reasonable inferences in favor of the nonmovant, and determine whether the movant proved that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). A defendant is entitled to summary judgment if the defendant either disproves an element of each of the plaintiff's causes of action or establishes an affirmative defense on each of the plaintiffs causes of action as a matter of law. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). When a defendant moves for summary judgment on limitations and the plaintiff relies upon a tolling statute, the defendant must negate the applicability of that statute. *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 891 (Tex. 1975). Not until the defendant shows that the plaintiff's cause is barred by limitations does the burden shift to the plaintiff to establish tolling. *See Wise v. Anderson*, 359 S.W.2d 876, 880 (Tex. 1962).

B. Analysis.

Section 16.064 provides a tolling provision for litigation initially filed in a court without jurisdiction if, within sixty days of the dismissal for

lack of jurisdiction, suit is filed in a court of proper jurisdiction and if the initial filing was not done with intentional disregard of proper jurisdiction. This statute is to be liberally construed to effectuate its manifest objective - relief from penalty of limitation bar to one who has mistakenly brought his action in the wrong court - but its reach is not limitless. *Clary Corp.* v. *Smith*, 949 S.W.2d 452, 461 (Tex. App.—Fort Worth 1997, writ denied).

Ford argues that the focus should not be on where the case was filed, but where it was not filed. Ford contends that Parker knew state court was the proper jurisdiction but yet intentionally filed her lawsuit in bankruptcy court. Ford incorrectly assumes that there was only one proper jurisdiction when the adversary proceeding was filed, which potentially would read the statute out of existence.[1] Under Ford's analysis, if a claimant could clearly file suit in state court, but in good faith incorrectly thought it could also file suit in federal court using diversity jurisdiction, then the claimant's knowledge that state court was an appropriate forum would foreclose any reliance on Section 16.064. We believe it clear that the legislature intended the statute to toll limitations when, for example, a claimant makes a good faith mistake concerning a defendant's residence or principal place of business or when calculating the amount in controversy.

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[1] Because Parker's bankruptcy proceeding was still pending and because any recovery she obtained was potentially subject to the trustee's administration, the federal district court where Parker's bankruptcy proceeding was pending also had jurisdiction. *See* 28 U.S.C. § 1334(b).

Conversely, Parker argues that defendants were required to prove that "there was *no way* for the courts where Parker's suit was previously filed could have had jurisdiction over the case and that Parker knew this, but nevertheless she filed the prior suits anyway." Parker's analysis would make Section 16.064 inapplicable unless the plaintiff makes a remarkable confession and, in most instances, waives the attorney-client privilege to do so. In an appropriate case, the plaintiff's knowledge and state of mind could be necessary to a determination of the statute's application, but we do not believe that it is necessarily so in every case.

In this case, Section 16.064 did not toll limitations because, even assuming every statement and allegation in Parker's adversary complaint is taken as true, that pleading affirmatively establishes that the bankruptcy court did not have jurisdiction. It was unnecessary for defendants to prove that Parker consciously appreciated this because her knowledge of the law is imputed. Absent some evidence of accident or mistake, filing suit with a pleading that on its face establishes the court's lack of jurisdiction does not invoke Section 16.064's tolling provision.

Parker's adversary complaint contained the following jurisdictional statement:

> This Court has jurisdiction and venue, as this is a core proceeding pursuant to 28 USC 157. Pursuant to 28 USC 157(b)(5), Plaintiff requests this case be transferred to the United States

District Court for the Western District of Texas, Austin Division, for jury trial.

Parker's personal injury suit was not a core proceeding. A core proceeding is one that involves a right created by the federal bankruptcy law, such as an action to avoid a preference, or is one that would only arise in bankruptcy, such as the filing of a proof of claim. *See Wood v. Wood*, 825 F.2d 90, 97 (5th Cir. 1987). Parker's suit was neither.

Parker contends that her claim was a core proceeding because her recovery would have been partially nonexempt and, thus, subject to the bankruptcy trustee's administration. Parker confuses "related to" jurisdiction with "core" jurisdiction. Because any recovery could conceivably have increased the debtor's estate, it was clearly within related to jurisdiction. *See Health Care, Inc. v. Prescription Home Health Care, Inc.*, 316 F.3d 542, 547 (5th Cir. 2002) (the usual test for related to jurisdiction is whether the outcome of a proceeding could conceivably have any effect on the estate being administered). But, because her adversary complaint identified no right created by federal bankruptcy law nor was it an action that could only arise in a bankruptcy proceeding, it was not a core proceeding.

Moreover, the very bankruptcy statute Parker cited, 28 U.S.C. § 157, makes clear that the bankruptcy court had no jurisdiction to hear Parker's personal injury suit. Section 157 defines a bankruptcy court's jurisdiction and provides bankruptcy judges with the jurisdiction to "hear and determine all cases under title 11 and all core

proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title." Section 157(b)(l). The statute provides further, however, that:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

Section 157(b)(5).

Parker argued that Section 157 merely required the trial to occur in district court, but because her recovery was subject to the trustee's administration, the appropriate course was to file it in bankruptcy court and then have it transferred to district court for trial. The bankruptcy court rejected this construction of Section 157 holding that "it lacked jurisdiction to hear or authority to transfer [Parker's] personal injury case to the District Court." The bankruptcy court's interpretation of its own jurisdictional statute is entitled to deference. Parker has provided this court with no authority indicating that this interpretation was incorrect, and we have found none ourselves.

Instead, the law is clear that bankruptcy courts have no jurisdiction over personal injury

suits. Section 157(b)(5) was added in response to the Supreme Court's ruling in *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The court ruled that a previous grant of sweeping jurisdiction to bankruptcy courts was unconstitutional because it vested Article III power in judges who did not enjoy Article III's protections or safeguards. *Id.* at 62. Section 157(b)(5) excluded from their jurisdiction subject matter not specifically derived from bankruptcy law. *Wood.* 825 F.2d at 95. This gave district courts jurisdiction over personal injury and wrongful death actions, while preserving for bankruptcy courts the jurisdiction to deal with bankruptcy-related matters. *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 831 (5th Cir. 1993).

Because bankruptcy courts have no jurisdiction over personal injury suits, Parker's construction of Section 157 to require only that the trial occur in district court is incorrect. No jurisdiction means exactly that. The bankruptcy court had no authority to do anything with Parker's personal injury suit. Whether Parker was conscious of this is immaterial. All persons are presumed to know the law and are charged with knowledge of statutory provisions. *Virtual Healthcare Servs., Ltd. v. Laborde*, 193 S.W.3d 636, 644 (Tex. App.—Eastland 2006, no pet.). Parker, therefore, is charged with knowledge that the bankruptcy court had no jurisdiction.

The defendants carried their burden of proof by showing that the adversary proceeding was filed in the bankruptcy court even though the complaint on its face established that court's lack of

jurisdiction. It was incumbent upon Parker to produce sufficient evidence to create a question of fact. *Cf. Williamson v. John Deere Co.*, 708 S.W.2d 38, 40 (Tex. App.—Tyler 1986, no writ) (plaintiffs original federal court pleading clearly showed on its face that diversity jurisdiction did not exist because the parties were all Texas residents, but the affidavit of plaintiffs counsel explaining that this was the result of his mistake was sufficient to create a fact question). Parker filed a summary judgment response, but no summary judgment evidence.[2]

During oral argument, counsel explained that he initially filed suit in bankruptcy court because of his construction of Section 157, and he elaborated on that construction. We have considered this argument for purposes of analyzing the statue. But, because counsel did not file an affidavit with the trial court in response to the defendants' motions for summary judgment, we cannot consider counsel's comments for any other purpose.[3] *See Deerfield Land Joint Venture v. S. Union Realty Co.*, 758 S.W.2d 608, 611 (Tex. App.—Dallas 1988, writ denied) (reviewing court considers only evidence that was before the trial court at time of summary judgment hearing).

Parker filed a "supplemental brief on collateral estoppel" the week before oral argument.

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[2] After the summary judgment hearing, Parker filed a motion for leave to file summary judgment evidence. The trial court denied Parker's motion for leave. Parker does not challenge that ruling.

[3] Nor was an affidavit from counsel included in the evidence Parker attempted to file after the summary judgment hearing.

In this brief, she asserted that defendants were collaterally estopped from asserting a statute of limitations defense because this argument had been presented to, and denied by, the federal district court. Parker refers this court to an order entered by the district court that addressed a number of pretrial motions, including motions to dismiss for failure to state a claim. Of relevance to this proceeding, the court held:

> Although Defendants assert that Parker's first filing in the bankruptcy court was done with "intentional disregard of proper jurisdiction," this Court cannot so conclude based on the pleadings. Accordingly, Defendants' motions to dismiss based on the statute of limitations will be denied.

Collateral estoppel applies when (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action, and (2) those facts were essential to the judgment in the first action. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 519 (Tex. 1998). That doctrine does not apply to the federal court's pretrial order.

First, the federal court did not find that Parker acted without intentional disregard, it simply held that defendants had not carried their burden

under FED. R. CIV. P. 12(b)(6).[4] The failure to find a fact does not establish the opposite proposition. *See Battaglia v. Alexander,* 177 S.W.3d 893,903 (Tex. 2005) (jury's failure to find doctor negligent was not an affirmative finding that he was not). Second, this was a pretrial ruling on the sufficiency of Parker's allegations. It did not represent a full and fair litigation of the limitations issue.[5] Had the federal court not later dismissed the suit for lack of subject-matter jurisdiction, this order would not have prevented the defendants from continuing to assert limitations. The court's determination that Parker's complaint stated a claim is far short of a final judgment that Parker did not act with intentional disregard. Collateral estoppel, therefore, does not apply.

IV. *Holding*

The summary judgment evidence established that Parker filed suit in a court that - based solely on the statements in her own complaint - clearly had no jurisdiction to consider it. Parker failed to create a

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[4] When deciding a Rule 12(b)(6) motion, federal courts are required to accept as true well-pleaded factual allegations in the plaintiff s complaint. *C.C. Port, Ltd. v. Davis-Penn Mortgage Co.,* 61 F.3d 288, 289 (5th Cir. 1995). Dismissal is proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of claim that would entitle him to relief. *Campbell v. City of San Antonio,* 43 F.3d 973, 975 (5th Cir. 1995).

[5] Federal courts may not grant a Rule 12(b)(6) motion merely because they believe almost to a certainty that the plaintiff is unlikely to prevail on the merits. *Clark v. Amoco Prod. Co.,* 794 F.2d 967, 970 (5th Cir, 1986). The question is whether the complaint states a claim. *Id.*

question of fact on Section 16.064's application; accordingly, we cannot say that the trial court erred by granting defendants' motions for summary judgment. The judgment of the trial court is affirmed.

/s/ Rick Strange
RICK STRANGE
JUSTICE

February 22, 2007

Panel consists of: Wright, C.J.,
McCall, J., and Strange, J.

IN THE 385TH JUDICIAL DISTRICT COURT OF MIDLAND COUNTY, TEXAS

[ENTERED: JULY 27, 2005]

DEBORAH KAY PARKER

VS. **NO. CV44839**

LEE EDWARD CUMMING, SOCIETY OF ST. VINCENT DE PAUL, CATHOLIC DIOCESE OF MIDLAND, TEXAS; JIM BASS FORD, and MERCURY AUTOMOBILE COMPANY

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On the 22nd day of July, 2005, came on to be considered Defendants Lee Edward Cumming, Jim Bass Ford and Ford Motor Co., designated in petition as Mercury Automobile Co. Motions for Summary Judgment. Plaintiff and Defendants appeared by and through their counsel of record.

The Court, having considered Defendants' Motions for Summary Judgment finds that based on the record and the evidence before the Court that the statute of limitations had expired prior to the filing of this suit and therefore the motions for Summary Judgment should be granted, and it is accordingly,

ORDERED ADJUDGED AND DECREED that Defendant' s Motions for Summary Judgment are hereby **GRANTED** in all respects, and Plaintiff

shall take nothing by way of those causes of action asserted by her herein as against Defendants Lee Edward Cumming, Jim Bass Ford and Ford Motor Co., designated in petition as Mercury Automobile Co..

IT IS FURTHER ORDERED that Plaintiff's causes of action against Defendants Lee Edward Cumming, Jim Bass Ford and Ford Motor Co., designated in petition as Mercury Automobile Co. be severed from the underlying case and the District Clerk assign it Cause No. CV45175 and file in Cause No. CV45175 a copy of the following:

1. Plaintiffs original Petition and Request for Jury Trial;

2. Defendants Lee Edward Cumming, Jim Bass Ford and Ford Motor Co., designated in petition as Mercury Automobile Co. Original Answers;

3. Defendants Lee Edward Cumming, Jim Bass Ford and Ford Motor Co., designated in petition as Mercury Automobile Co. Motions for Summary Judgment and Motion for Severance.

4. Plaintiff's Response to Defendants Lee Edward Cumming, Jim Bass Ford and Ford Motor Co., designated in petition as Mercury Automobile Co. Motions for Summary Judgment;

5. Plaintiff's Motion for Leave to File Supplemental Joint Response and Affidavits in Response to the Plea in Abatement and Motion for

Summary Judgment filed by Ford Motor Co. and joined by Lee Cumming.

6. This order Granting Defendants' Summary Judgments and Severance.

IT IS FURTHER ORDERED that all relief not specifically granted is hereby denied.

IT IS FURTHER ORDERED that court costs will be assessed against the party incurring same.

Signed this the 27th day of July, 2005.

/s/ Robin Malone Darr
ROBIN MALONE DARR
JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DEBORAH KAY PARKER.

PLAINTIFF,

V. CAUSE NO. A-03-CA-228-LY

LEE EDWARD CUMMING; SOCIETY OF ST. VINCENT DE PAUL; CATHOLIC DICOCESE OF MIDLAND, TEXAS; JIM BASS FORD; FORD MOTOR COMPANY AND JOE WILKINSON,

DEFENDANTS.

ORDER

Before the Court are Plaintiff's Motion for Case Management Conference, and Discovery Plan, Order of Referral to Mediation and Setting of Jury Trial Date (Doc. #33); Plaintiff's Notice of Closing of Chapter 7 Bankruptcy, Motion to Delete Trustee from Service List and Motion to Confirm Venue (Doc. #34); Defendant, Lee Edward Cumming's Response to Plaintiff's Motion to Confirm Venue and Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. #35); and Plaintiff's Objection to Motion to Dismiss of Lee Edward Cumming, Motion to Remand to State District Court and Request for Evidentiary Hearing if Necessary (Doc. #36). Defendant Lee Cumming seeks dismissal of Plaintiff's claims in this case under Federal Rule of Civil Procedure 12(b)(1). On September 7, 2004 this

Court held a status conference wherein each party was represented by counsel. All parties agreed that this Court no longer maintains jurisdiction over this matter, After reviewing Defendant Cumming's motion to dismiss for lack of subject matter jurisdiction, the pleadings, argument from counsel, and the applicable law, this Court is of the opinion that Cumming's motion should be granted.

Plaintiff originally brought this suit under federal bankruptcy provision 28 U.S.C section 157. The bankruptcy case is now closed. In his motion to dismiss, Defendant Cumming contends that this Court lacks subject matter jurisdiction over this case because the parties are not diverse and, now that the bankruptcy case has concluded, there is no federal question. This Court agrees.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss filed April 12, 2004 (Doc. #35) is **GRANTED**. As this Court lacks Jurisdiction of Plaintiff's action, Plaintiff's claims against Defendants are **DISMISSED WITHOUT PREJUDUICE** to refiling.

IT IS FURTHER ORDERED that all other pending motions in this action are **DISMISSED WITHOUT PREJUDICE**.

SIGNED this 8th day of September, 2004.

/s/ Lee Yeakel
Lee Yeakel
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DEBORAH KAYE PARKER,

PLAINTIFF,

V. CAUSE NO. A-03-CA-228-LY

LEE EDWARD CUMMING; SOCIETY OF ST. VINCENT DE PAUL, CATHOLIC DIOCESE OF MIDLAND, TEXAS; JIM BASS FORD; AND FORD MOTOR COMPANY,

DEFENDANTS.

ORDER

Before the Court are the following motions: Defendant Jim Bass Ford's Motion to Dismiss for Plaintiffs Failure to State a Claim (Clerk's Doc. No. 13); Plaintiff's Motion to Vacate Order of Dismissal in Favor of Ford Motor Company (Clerk's Doc. No. 20-1); Plaintiff's Motion for Leave to File Late Response (Clerk's Doc. No. 20-2); Plaintiff's Request for Evidentiary Hearing (Clerk's Doc. No. 20-3); Plaintiffs Motion to Vacate Order of Dismissal of Suit Against Lee Edward Cumming (Clerk's Doc. No. 22-1); Plaintiffs Motion for Leave to File Late Response (Clerk's Doc. No. 22-2); Plaintiffs Request for Evidentiary Hearing (Clerk's Doc. No. 22-3); and Defendants Society of St. Vincent de Paul and Catholic Diocese of Midland, Texas's Motion to

Dismiss for Failure to State Claim Pursuant to FRCP 12(b)(6) (Clerk's Doc. No. 26).

I. Background

This action arises out of an automobile collision involving Plaintiff Parker, Defendant Cumming, and Defendant Society of St. Vincent de Paul (the "Society"), which occurred on January 27, 2001. Parker alleges that she was driving behind Gumming, and an automobile associated with the Society was driving behind her, when Cumming stopped suddenly causing Parker to collide with Cumming and the Society automobile to collide with Parker. During the collision, Parker's airbag did not deploy, her seatbelt failed to restrain her, and her seat collapsed backward, resulting in various bodily injuries. Before the collision, Parker had been having trouble with the brakes on her Mercury Sable automobile. On January 24, 2001, Parker delivered her car to Defendant Jim Bass Ford ("Bass Ford") for repairs. When she returned to retrieve the vehicle, she was told that no work had been done because "someone had been sick." Parker asserts that she was thus forced to drive a car with faulty brakes, contributing to the collision. Parker sued Cumming, the Society, Ford Motor Company ("Ford"), and Bass Ford for their alleged responsibility in causing the collision and Parker's resultant physical injuries.

On January 24, 2003, Parker, a debtor in bankruptcy, whose bankruptcy case is pending in the United States Bankruptcy Court for the Western District of Texas, Austin Division, filed an

adversary proceeding asserting personal-injury claims against these defendants and alleging her action to be a "core proceeding" in her bankruptcy case. See 28 U.S.C. § 157. But the bankruptcy court, finding that it lacked jurisdiction to hear or authority to transfer the action to this Court, dismissed the claims on April 2, 2003, stating that "the Plaintiff should have either requested that the reference be withdrawn by the District Court or should have filed this proceeding directly with the District Court instead of the Bankruptcy Court as required by [28 U.S.C] § 157(b)(5)." On April 11, 2003, Parker filed the instant action in this Court.

On June 6, 2003, Bass Ford filed its motion to dismiss for failure to state a claim, arguing that Parker's claims are barred by Texas's two-year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (West 2002). On June 11, 2003, Cumming filed a motion to dismiss on the same grounds. And on June 13,2003,Ford filed a motion to dismiss for lack of subject-matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(l), asserting that this Court has neither federal-question jurisdiction, *see* 28 U.S.C. § 1331, nor diversity jurisdiction, *see* 28 U.S.C. § 1332, over Parker's claims. Parker failed to file timely responses to Cumming's and Ford's motions to dismiss, and on August 21, 2003, this Court, the Honorable James R. Nowlin presiding, granted the motions as unopposed, pursuant to the local rules of the Western District of Texas. *See* W.D. Tex. Local R. CV-7(d). Parker responded (one day late) to Bass Ford's motion to dismiss, which is now before the Court. On September 4, 2003, Parker moved to

vacate the orders dismissing Cumming and Ford, *see* Fed. R. Civ. P. 60, and requested leave to file late responses to Cumming's and Ford's motions to dismiss. Parker's attorney blamed his failure to respond on side effects from pain medication taken to treat his broken back. Cumming responded in opposition to Parker's motion to vacate the order dismissing him. Ford failed to respond. Finally, on September 16, 2003, the Society filed a motion to dismiss for failure to state a claim based on the same statute-of-limitations defense presented in Cumming's and Bass Ford's motions to dismiss. Parker filed a timely response.

II. Analysis

A. Motions to Vacate

First, the Court will address Parker's motions to vacate the orders dismissing Cumming and Ford. The sole basis for granting the motions to dismiss was Local Rule CV-7(d), which requires a party opposed to a motion to respond within eleven days of service of the motion and allows the district court to grant the motion as unopposed if no timely response is filed. *See* W.D. Tex. Local R. CV-7(d). However, the Fifth Circuit does not approve of automatically granting dispositive motions based on a party's failure to respond. *See John v. Louisiana Bd. Of Trs. for State Colls., & Univs.*, 757 F.2d 698,707-10 (5th Cir. 1985) ("[Although we have endorsed the adoption of local rules that require parties to file responses to opposed motions, we have not approved the automatic grant, upon failure to comply with such rules, of motions that

are dispositive of the litigation."). Accordingly, the Court will consider the merits of the original motions.

B. Dismissal Based on Lack of Subject-Matter Jurisdiction

Ford moves to dismiss Parker's claims on the basis that this Court does not have subject-matter jurisdiction over them. Ford rightly notes that this Court has neither federal-question jurisdiction, *see* 28 U.S.C. § 1331, nor diversity jurisdiction, *see* 28 U.S.C. § 1332, over Parker's personal-injury claims. However, the Court's subject-matter jurisdiction is based on 28 U.S.C. § 1334, which states, "Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [bankruptcy], or arising in or related to cases under title 11." To determine if a matter is "related to" a bankruptcy case, the Court asks "whether the outcome of a proceeding could conceivably have any effect on the estate being administered in bankruptcy." *In re Prescription Horns Health Care, Inc.*, 316 F.3d 542, 547 (5th Cir. 2002) (citing *Celotex Corp, v. Edwards*, 514 US. 300,308 (1995)). The instant action could have an effect on Parker's bankruptcy estate by increasing its value if Parker prevails. *See, e.g.*, *Thomas v. R.J. Reynolds Tobacco Co.*, 259 B.R. 571, 575 (S.D. Miss. 2001) ("This court finds that the removed action is 'related to' the bankruptcy case because if a monetary judgment is rendered in favor of [the debtor], this award would have the effect of

increasing the property of the bankruptcy estate."). Accordingly, the Court finds that it has subject-matter jurisdiction over Parker's personal injury claims.

C. Dismissal Based on the Statute of Limitations

Cumming, Bass Ford, and the Society all move to dismiss Parker's action, arguing that it is barred by the two-year statute of limitations. Although the statute of limitations is an affirmative defense which must be pleaded and proved by the defendant, *see* Tex. R. Civ. P. 94; *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1988), it may be raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), but such motion cannot be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cross v. Lucius*, 713 F.2d 153, 156 (5th Cir, 1983) (quoting *Abdul-Alim Amir. v. Universal Life Ins. Co.*, 706 F.2d 638, 640 (5th Cir.1983)). In her Complaint, Parker states that she first filed her claims based on the January 27, 2001 collision in the bankruptcy court. The bankruptcy court's docket sheet reflects that the claims were filed on January 24, 2003 and dismissed on April 2, 2003. Parker alleges that the bankruptcy court dismissed the action "with direction that the case should be refiled in the District Court." However, the bankruptcy court's order contains no such "direction," but states, "Plaintiff should have either requested that the reference be withdrawn by the District Court or *should have filed* this proceeding directly with the District Court instead of the Bankruptcy Court as

required by [28 U.S.C] § 157(b)(5)" (emphasis added). Plaintiff filed suit in this Court on April 11, 2003, more than two years after the collision forming the basis of the claims, but only nine days after the bankruptcy court dismissed the action.

The period between the initial filing of an action and the second filing of the action in another court suspends the running of the statute of limitations if (1) the first-filed action was dismissed for lack of jurisdiction, and (2) the second action is commenced in a proper court within sixty days of the dismissal, provided the first filing was not "made with intentional disregard of proper jurisdiction." *See* Tex. Civ. Prac. & Rem. Cods Ann. § 16.064 (West 1997). Although Defendants assert that Parker's first filing in the bankruptcy court was done with "intentional disregard of proper jurisdiction," this Court cannot so conclude based on the pleadings. Accordingly, Defendants' motions to dismiss based on the statute of limitations will be denied.

III. Conclusion

For the reasons set forth above,

It is **ORDERED** that Defendant Jim Bass Ford's Motion to Dismiss for Plaintiff's Failure to State a Claim (Clerk's Doc. No. 13) is hereby **DENIED**.

It is further **ORDERED** that Plaintiff's Motion to Vacate Order of Dismissal in Favor of Ford Motor Company (Clerk's Doc. No. 20-1) is hereby **GRANTED**; the Order (Clerk's Doc. No. 19)

granting Ford's motion to dismiss is **VACATED**; and Ford Motor Company's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(l) (Clerk's Doc. No. 15) is **DENIED**. Plaintiff's Motion for Leave to File Late Response (Clerk's Doc. No. 20-2) is **GRANTED**, and Plaintiff's Request for Evidentiary Hearing (Clerk's Doc. No. 20-3) is **DISMISSED AS MOOT**.

It is further **ORDERED** that Plaintiff's Motion to Vacate Order of Dismissal of Suit Against Lee Edward Cumming (Clerk's Doc. No. 22-1) is hereby **GRANTED**; the Order (Clerk's Doc. No. 18) granting Cumming's motion to dismiss is **VACATED**; and Lee Edward Cumming's Motion to Dismiss for Plaintiff's Failure to State a Claim (Clerk's Doc. No. 14) is **DENIED**. Plaintiff's Motion for Leave to File Late Response (Clerk's Doc. No. 22-2) is **GRANTED**, and Plaintiff's Request for Evidentiary Hearing (Clerk's Doc. No. 22-3) is **DISMISSED AS MOOT**.

It is finally **ORDERED** that Defendants Society of St. Vincent de Paul and Catholic Diocese of Midland, Texas's Motion to Dismiss for Failure to State Claim Pursuant to FRCP 12(b)(6) (Clerk's Doc. No. 26) is hereby **DENIED**.

SIGNED this 15th day of March, 2004.

/s/ Lee Yeakel
Lee Yeakel
UNITED STATES DISTRICT JUDGE

IT IS HEREBY ADJUDGED and DECREED that the below described is SO ORDERED.

Dated: April 02, 2003

/s/ Frank R. Monroe
FRANK R. MONROE

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE: DEBORAH KAYE PARKER	) CASE NO. 02-12022FM) CHAPTER 7
DEBORAH KAYE PARKER Plaintiff	)
v.	)
LEE EDWARD CUMMING, SOCIETY OF ST. VINCENT DE PAUL, CATHOLIC DIOCESE OF MIDLAND, TEXAS, JIM BASS FORD, MERCURY AUTOMOBILE COMPANY, AND JOE WILKINSON Defendants	) ADVERSARY NO. 03-1019FM

ORDER DISMISSING ADVERSARY PROCEEDING

The Court held a hearing on its Order to Show Cause why this adversary proceeding which is a non-core-proceeding should not be dismissed for lack of jurisdiction on April 2, 2003 at 9:30 a.m. in Court Room Number 1 of the Homer Thornberry Judicial Building in Austin, Texas. Plaintiff had filed her Motion to transfer the proceeding to the District Court, but did not provide the Court with any authority to support her contention that this Court could make such transfer and this Court could find none after independent research. The Court therefore determined that pursuant to 28 U.S.C. §157(b)(5) it lacked jurisdiction to hear or authority to transfer this personal injury case to the District Court as requested by the Plaintiff in this proceeding. The Plaintiff should have either requested that the reference be withdrawn by the District Court or should have filed this proceeding directly with the District Court instead of the Bankruptcy Court as required by §157(b)(5). It is therefore

ORDERED that the above-referenced adversary proceeding be and is hereby in all things DISMISSED.

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OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

Re: Case No. 07-0408
COA #: 11-05-00380-CV

DATE: 10/26/2007

TC# CV45175

STYLE: DEBORAH KAY PARKER
v.
LEE EDWARD CUMMING, JIM BASS FORD AND FORD MOTOR COMPANY

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

MAIL TO:

MR. JAMES R. CHAPMAN JR.
P O BOX 841
FREDERICKSBURG, TX 78624

CASE NO. CV44839

DEBORAH KAY PARKER,

PLAINTIFF

IN THE DISTRICT COURT

VS.

385th JUDICIAL DISTRICT

LEE EDWARD CUMMING, SOCIETY OF ST. VICENT DE PAUL, CATHOLIC DIOCESE OF MIDLAND, TEXAS; JIM BASS FORD, MERCURY AUTOMOBILE COMPANY

DEFENDANTS

MIDLAND COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION

(Automobile Accident)

TO THE HONORABLE JUDGE OF SAID COURT:

1. Plaintiff is Deborah Kay Parker, a resident of Hays County, Texas. Discovery in this suit is level 3. Plaintiff requests a scheduling order be issued, and the matter set for jury trial. Plaintiff demands a jury trial.

2. This Court has jurisdiction and venue, as the accident the subject of this lawsuit occurred in Midland, Midland County, Texas. This case was

formerly prosecuted as a bankruptcy proceeding pursuant to 28 USC 157, and was timely filed in the United States Bankruptcy Court. Additional proceedings resulted in the case being transferred to the United States District Court, Western District of Texas, Austin Division. The United States Trustee opted out of the case, and the case was dismissed on or about September 9, 2004, for lack of subject matter jurisdiction. This suit is timely filed pursuant to Texas Civil Practice and Remedies Code 16.064.

3. Defendant Lee Edward Cumming ("Cumming") is a resident of Midland, Texas, and may be served with citation by Certified Mail, Return Receipt Requested, at his address of 1706 S. Camp, Midland, Texas 79701.

4. Defendant Society of St. Vincent De Paul, ("St. Vincent") Catholic Diocese of Midland, Texas, may be served with citation by Certified Mail, Return Receipt Requested care of Sherry L. Cox, Resident Manager, Society of St. Vincent de Paul, 701 North Ft. Worth Street, Midland, Texas 79701.

5. Defendant Jim Bass Ford ("Bass Ford") is a resident of Tom Green County, Texas and may be served with citation by Certified Mail, Return Receipt Requested care of John Bass, President, 2901 Sherwood Way, San Angelo, Texas 76902.

6. Defendant Mercury Automobile Company ("Mercury") is a wholly owned subsidiary of Ford Motor Company, with principal offices in Travis County, Texas, and may be served with citation by Certified Mail, Return Receipt Requested care of

Darryl Hazel, President, Mercury Automobile Company Division of Ford Motor Company, 16800 Executive Plaza Drive, Dearborn, Michigan 48126.

7. All Defendants have previously been served with citation, and made appearance in the Federal court proceedings. An additional courtesy copy of these pleadings is provided directly to counsel.

8. This lawsuit results from an automobile accident that occurred on January 27, 2001 at 500 Block of South Big Spring Street (State Highway 349 South) in Midland, Texas. Plaintiff was driving her vehicle in a prudent manner when Defendant Cumming suddenly stopped, causing impact with his rear bumper by Plaintiff, and Defendant St. Vincent almost simultaneously rear ended Plaintiff. As a result of the multiple impacts, and the other complaints set forth herein, plaintiff suffered serious and debilitating permanent injuries to her neck, shoulder, and entire body for which she now sues.

9. Prior to the accident on January 27, 2001, Plaintiff had been experiencing brake problems with her vehicle, a 2000 Mercury Sable. Plaintiff took her vehicle to Bass Ford on January 24, 2001, and requested repairs. When she returned to pick up her vehicle that evening, she was informed "no work" was done because someone "had been sick". Plaintiff was a consumer in seeking this repair work.

10. At the time and place of the accident, Plaintiff's air bag failed to deploy, and her seat belt failed to restrain her forward motion, and her seat

collapsed backward, failing to restrain motion backwards, as a result of which she was violently thrown forward and then backward, causing her to sustain injuries to her neck, shoulder, and entire body. Plaintiff was a consumer when she purchased her Mercury Sable automobile.

11. The accident caused Plaintiff to suffer severe and debilitating injuries, for which she now sues. As a proximate cause of the accident, Plaintiff has had multiple surgeries, has been disfigured, and has incurred medical costs in excess of $300,000.00.

12. Plaintiff sues all Defendants for her injuries, claiming joint and several liability in a proportionate degree of responsibility as determined by the trier of fact.

13. At the time of the accident, Defendant Cumming was operating his vehicle negligently in slowing or stopping too suddenly, and in failing to signal his intentions. Defendant Cumming is farther negligent per se in violating Article 6701(d) Section 108, Vernon's Annotated Texas Statutes, by removing the factory equipped energy absorbing bumper, and replacing it, or driving his vehicle with an "oil field bumper" of solid iron, which in effect turned his vehicle into a battering ram, and posed an unreasonable risk of harm to Plaintiff. Defendant had a duty to exercise ordinary care and operate his vehicle reasonably and prudently, and not to create an extra hazardous condition to other vehicles. Defendant breached that duty in one or more of the following ways:

a. Failing to timely apply his brakes.

b. Failing to maintain a proper lookout.

c. Failing to turn his vehicle to avoid the collision.

d. Driving his vehicle at a rate of speed that an ordinary and prudent person would not have driven under the same or similar circumstances.

e. Violating applicable federal safety rules regarding requirements of energy absorbing bumpers;

f. Violating Article 6701d, V.A.T.S., Section 108, by operating his vehicle without factory installed, and legally mandated safety equipment, i, e., an energy absorbing bumper, which is negligence per se.

14. At the time and place of the accident Defendant St. Vincent was operating its vehicle negligently in failing to stop in time to avoid impact with Plaintiff. Defendant had a duty to exercise ordinary care and operate his vehicle reasonably and prudently. Defendant breached that duty in one or more of the following ways:

a. Failing to timely apply his brakes.

b. Failing to maintain a proper lookout.

c. Failing to turn his vehicle to avoid the collision.

d. Driving his vehicle at a rate of speed that an ordinary and prudent person would not have driven under the same or similar circumstances.

15. At the time and place of the accident, Plaintiff was unable to stop in time due to faulty brakes on her 2000 Mercury Sable. Plaintiff sought repair work from Bass Ford which was negligently, and unreasonably not done. The inaction of Bass Ford violated Defendant's duty to Plaintiff, and contributed to her injuries in forcing Plaintiff to drive a vehicle with poor brakes. Although Plaintiff attempted to compensate for such condition, she was unable to avoid the collision although she affirmatively alleges she was exercising all due care possible at the time and place of the accident. Plaintiff sues Bass Ford for negligence, breach of contract, and deceptive trade practices, in unreasonably failing to repair her brakes, or provide her with an alternative vehicle until repairs could be made.

15. At the time and place of accident, Plaintiff's brakes, air bag, seat and seat belt failed to properly function to provide protection to Plaintiff from injuries. Defendant Mercury breached its duty to Plaintiff to provide a safe product, and a product with safety devices that operated as intended at the time of the accident. Plaintiff sues Mercury for products liability, negligence, breach of express and implied warranties, and deceptive trade practices in selling her a vehicle that was unreasonably dangerous under the conditions at the time of the accident, and on which the safety features designed

to protect Plaintiff failed to properly operate, and failed to provide any protection from injury.

16. Plaintiff requests a jury trial, and tenders her jury fee.

17. Plaintiff affirmatively pleads that she seeks monetary relief aggregating $2,000,000 or more as may be found by the trier of fact, excluding costs, prejudgment interest, and attorney fees.

18. Plaintiff s damages, which are unliquidated, are within the jurisdictional limits of the court.

19. Plaintiff sues Defendants jointly and severally, for negligence, and other causes of action as plead hereinabove, as the conduct of Defendants was a proximate cause of Plaintiff's injuries to her neck, shoulder, and entire body. As a result of plaintiff's injuries, plaintiff suffered the following damages:

a. Physical pain and mental anguish in the past and future.

b. Lost earnings.

c. Damage to earning capacity.

d. Disfigurement in the past and future.

e. Physical impairment in the past and future.

f. Medical expenses in the past and future.

g. Loss of consortium in the future.

h. Loss of household services in the past and future.

i. Property damage.

WHEREFORE, PREMISES CONSIDERED, Plaintiff asks that Defendants be cited to appear and answer and that plaintiff have judgment against defendants, jointly and severally, in such proportions as may be determined by the jury, for the following:

a. Actual damages within the jurisdictional limits of this court.

b. Prejudgment and post-judgment interest as allowed by law.

c. Costs of suit.

d. All other relief, in law and in equity, to which plaintiff may be entitled.

Respectfully submitted,

/s/ James R. Chapman, Jr.
James R. Chapman, Jr. 04134700
Attorney for Plaintiff
P.O. Box 841
Fredericksburg, TX 78624
(830) 997-3269 No Fax

UNITED STATES DISTRICT COURT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CASE NO. AO3 CA 228 JN
JURY REQUESTED

DEBORAH KAYE PARKER
PLAINTIFF

VS.

LEE EDWARD CUMMING, SOCIETY OF ST. VINCENT DE PAUL, CATHOLIC DIOCESE OF MIDLAND, TEXAS; JIM BASS FORD, FORD MOTOR COMPANY AND JOE WILKINSON
DEFENDANTS

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

1. Plaintiff is Deborah Kay Parker, a Debtor in Bankruptcy Case No. 02-12022-FRM now pending in the U. S. Bankruptcy Court for the Western District of Texas, Austin Division.

2. This Court has jurisdiction and venue, as this is personal injury and jury case for a Bankrupt Debtor in the Western District of Texas, Austin Division. The case was originally filed in the Bankruptcy Court as a core proceeding, pursuant to 28 USC 157. Pursuant to 28 USC 157(b)(5), Plaintiff requested this case be transferred to the United

States District Court for the Western District of Texas, Austin Division, for jury trial. The Bankruptcy Court denied that motion on April 2, 2003, and dismissed the Adversary Proceeding under cause number 03-1019FM, with direction that the case should be refilled in the District Court. Plaintiff files this suit in compliance with those instructions.

3. Defendant Lee Edward Cumming ("Cumming") is a resident of Midland, Texas, and may be served with summons at his address of 1706 S. Camp, Midland, Texas 79701. Defendant's counsel made limited entry of appearance in the bankruptcy proceeding, and a Notice of Lawsuit and Request for Waiver of Summons, along with a Waiver of Service of Summons pursuant to Federal Rule of Civil Procedure 4 has been mailed pursuant to the Federal Rules of Civil Procedure to each Defendant and their counsel. No service of summons is necessary at this time. If this Defendant fails or refuses to waive service, appropriate summons will be issued and served, and a motion for sanctions, and to impose costs will be filed with the Court.

4. Defendant Society of St. Vincent De Paul, ("St. Vincent") Catholic Diocese of Midland, Texas, may be served with summons care of Sherry L. Cox, Resident Manager, Society of St. Vincent de Paul, 701 North Ft. Worth Street, Midland, Texas 79701. Defendant's counsel made limited entry of appearance in the bankruptcy proceeding, and a Notice of Lawsuit and Request for Waiver of Summons, along with a Waiver of Service of Summons pursuant to Federal Rule of Civil

Procedure 4 has been mailed pursuant to the Federal Rules of Civil Procedure to each Defendant and their counsel. No service of summons is necessary at this time. If this Defendant fails or refuses to waive service, appropriate summons will be issued and served, and a motion for sanctions, and to impose costs will be filed with the Court.

5. Defendant Jim Bass Ford ("Bass Ford") is a resident of Tom Green County, Texas and may be served with summons care of John Bass, President, 2901 Sherwood Way, San Angelo, Texas 76902. Defendant's counsel made limited entry of appearance in the bankruptcy proceeding, and a Notice of Lawsuit and Request for Waiver of Summons, along with a Waiver of Service of Summons pursuant to Federal Rule of Civil Procedure 4 has been mailed pursuant to the Federal Rules of Civil Procedure to each Defendant and their counsel. No service of summons is necessary at this time. If this Defendant fails or refuses to waive service, appropriate summons will be issued and served, and a motion for sanctions, and to impose costs will be filed with the Court.

6. Defendant Ford Motor Company has principal offices in Travis County, Texas, and may be served with summons care of Darryl Hazel, President, Ford Motor Company Automobile Company Division of Ford Motor Company, 16800 Executive Plaza Drive Dearborn, Michigan 48126. Defendant's counsel made limited entry of appearance in the bankruptcy proceeding, and a Notice of Lawsuit and Request for Waiver of Summons, along with a Waiver of Service of

Summons pursuant to Federal Rule of Civil Procedure 4 has been mailed pursuant to the Federal Rules of Civil Procedure to each Defendant and their counsel. No service of summons is necessary at this time. If this Defendant fails or refuses to waive service, appropriate summons will be issued and served, and a motion for sanctions, and to impose costs will be filed with the Court.

7. Defendant Joe Wilkinson ("Dr. Wilkinson") is a resident of San Angelo, Texas, and may be served with summons at 3555 Knickerbocker Road, San Angelo, Texas 76904. Defendant's counsel made limited entry of appearance in the bankruptcy proceeding, and a Notice of Lawsuit and Request for "Waiver of Summons, along with a Waiver of Service of Summons pursuant to Federal Rule of Civil Procedure 4 has been mailed pursuant to the Federal Rules of Civil Procedure to each Defendant and their counsel. No service of summons is necessary at this time. If this Defendant fails or refuses to waive service, appropriate summons will be issued and served, and a motion for sanctions, and to impose costs will be filed with the Court.

FACTS COMMON TO ALL CLAIMS

8. This lawsuit results from an automobile accident that occurred on January 27, 2001 at 500 Block of South Big Spring Street (State Highway 349 South) in Midland, Texas. Plaintiff was driving her vehicle in a prudent manner when Defendant Cumming suddenly stopped, causing impact with his rear bumper by Plaintiff, and Defendant St. Vincent rear ended Plaintiff. As a result of the multiple

impacts, and the other complaints set forth herein, plaintiff suffered serious and debilitating permanent injuries for which she now sues.

9. Prior to the accident on January 27, 2001, Plaintiff had been experiencing brake problems with her vehicle, a 2000 Mercury Sable. Plaintiff took her vehicle to Bass Ford on January 24, 2001, and requested repairs. When she returned to pick up her vehicle that evening, she was informed "no work" was done because someone had been sick. Plaintiff was a consumer in seeking this repair work.

10. At the time and place of the accident, Plaintiff's air bag failed to deploy, and her seat belt failed to restrain her forward motion, as a result of which she was violently thrown forward at the time of impact, and injured her neck, shoulder, and entire body. When she was rear ended by St Vincent, the seat collapsed backwards, further injuring her. Plaintiff was a consumer when she purchased her Mercury Sable automobile.

11. Subsequent to her accident, and sustaining injuries, Plaintiff s sought medical care from Dr. Wilkinson. Dr. Wilkinson checked on Plaintiff and dismissed her as being "all right". Plaintiff, approximately two months later, because of continuing pain and problems, sought medical care from another Doctor, with the end result of Plaintiff being diagnosed with serious injuries caused by the automobile accident of January 27, 2001, for which she has had multiple surgeries, and incurred over $200,000 in medical bills.

12. Plaintiff sues all Defendants for her injuries, claiming joint and several liability in a proportionate degree of responsibility as determined by the trier of fact.

13. At the time of the accident, Defendant Cumming was operating his vehicle negligently in slowing or stopping too suddenly, and in failing to signal his intentions. Defendant Cumming is further negligent per se in violating Article 6701(d) Section 108, by removing the factory equipped energy absorbing bumper, and replacing it, or driving his vehicle with an "oil field bumper" of solid iron, which in effect turned his vehicle into a battering ram, and posed an unreasonable risk of harm to Plaintiff. Defendant had a duty to exercise ordinary care and operate his vehicle reasonably and prudently, and not to create an extra hazardous condition to other vehicles. Defendant breached that duty in one or more of the following ways:

a. Failing to timely apply his brakes.

b. Failing to maintain a proper lookout.

c. Failing to turn his vehicle to avoid the collision.

d. Driving his vehicle at a rate of speed that an ordinary and prudent person would not have driven under the same or similar circumstances.

e. Violating Article 6701d, V.A.T.S., Section 108, by operating his vehicle without factory installed, and legally mandated safety equipment, i.e., an

energy absorbing bumper, which is negligence per se.

14. At the time and place of the accident Defendant St. Vincent was operating his vehicle negligently in failing to stop in time to avoid impact with Plaintiff. Defendant had a duty to exercise ordinary care and operate his vehicle reasonably and prudently. Defendant breached that duty in one or more of the following ways:

a. Failing to timely apply his brakes.

b. Failing to maintain a proper lookout.

c. Failing to turn his vehicle to avoid the collision.

d. Driving his vehicle at a rate of speed that an ordinary and prudent person would not have driven under the same or similar circumstances.

14. At the time and place of the accident, Plaintiff was unable to stop in time due to faulty brakes on her 2000 Mercury Sable. Plaintiff sought repair work from Bass Ford which was negligently, and unreasonably not done. The inaction of Bass Ford violated Defendant's duty to Plaintiff, and contributed to her injuries in forcing Plaintiff to drive a vehicle with poor brakes. Although Plaintiff attempted to compensate for such condition, she was unable to avoid the collision although she affirmatively alleges she was exercising all due care possible at the time and place of the accident. Plaintiff sues Bass Ford for negligence, breach of

contract, and deceptive trade practices, in unreasonably failing to repair her brakes, or provide her with an alternative vehicle until repairs could be made.

15. At the time and place of accident, Plaintiff's brakes, air bag, seat and seat belt failed to properly function to provide protection to Plaintiff from injuries. Defendant Ford Motor Company breached its duty to Plaintiff to provide a safe product, and a product with safety devices that operated as intended at the time of the accident. Plaintiff sues Ford Motor Company for products liability, negligence, breach of express and implied warranties, and deceptive trade practices in selling her a vehicle that was unreasonably dangerous under the conditions at the time of the accident, and on which the safety features designed to protect Plaintiff failed to properly operate, and failed to provide any protection from injury.

16. At the time of the accident, Plaintiff suffered pain and injury, for which she sought medical treatment from Dr. Wilkenson. Dr. Wilkenson failed to properly diagnose the nature and extent of Plaintiff's injuries, and failed to render proper medical treatment. Plaintiff sues for medical malpractice for failure to properly diagnose, and treat Plaintiff for the injuries she suffered on January 27, 2001 or during any continuing course of prior treatment if discovery reveals other negligence.

17. Plaintiff affirmatively pleads that she seeks monetary relief aggregating $2,000,000 or

more as may be found by the trier of fact, excluding costs, prejudgment interest, and attorney fees.

18. Plaintiff's damages, which are unliquidated, are within the jurisdictional limits of the court.

19. Plaintiff sues Defendants jointly and severally, for negligence, and other causes of action as plead hereinabove, as the conduct of Defendants was a proximate cause of Plaintiff's injuries to her neck, shoulder, and entire body. As a result of plaintiff's injuries, plaintiff suffered the following damages:

a. Physical pain and mental anguish in the past and future.

b. Lost earnings.

c. Damage to earning capacity.

d. Disfigurement in the past and future.

e. Physical impairment in the past and future.

f. Medical expenses in the past and future.

g. Loss of consortium in the future.

h. Loss of household services in the past and future.

i. Property damage.

20. Plaintiff requests a jury trial and files simultaneously herewith a separate request for jury trial.

21. WHEREFORE, PREMISES CONSIDERED, Plaintiff asks that Defendants be summoned to appear and answer and that plaintiff have judgment against defendants, jointly and severally, in such proportions as may be determined by the jury, for the following:

a. Actual damages within the jurisdictional limits of this court.

b. Prejudgment and post-judgment interest as allowed by law.

c. Costs of suit.

d. All other relief, in law and in equity, to which plaintiff may be entitled.

Respectfully submitted,

/s/ James R. Chapman, Jr.
James R. Chapman, Jr. 04134700
Attorney for Plaintiff
Special Counsel to Trustee
P. 0. Box 841
Fredericksburg, TX 78624
(830) 997-3269 No Fax

Copy to:
Marsha Milligan, Chapter 7 Trustee
P. O. Box 92408
Austin Tx 78709-2408
(512) 494-1077 x 203

VERIFICATION

ON THIS DAY, personally appeared Deborah Kaye Parker, Plaintiff and who, identified by me, the undersigned Notary Public by TDL 05861246 being duly sworn, deposed and said:

"My name is Deborah Kaye Parker, and I am Plaintiff in this suit. I have read the above and foregoing Plaintiff's Original Complaint, and it is true and correct to the best of my knowledge and belief".

/s/ Deborah Kaye Parker
Deborah Kaye Parker, Plaintiff

To certify which witness my hand and seal of office this 11th day of April, 2003.

/s/ Shanese Tatsch
Shanese Tatsch

CERTIFICATE OF SERVICE

I certify a copy of this document was forwarded U. S. Mail, postage prepaid, to the undersigned persons on April 11, 2003, pursuant to the Federal Rules of Civil Procedure.

Gray & Becker, P. C.
Attn: John Jacks
Attorneys for Dr. Joe Wilkerson
900 West Avenue
Austin, Texas 78701
(512)
FAX (512)

Brown & McCarroll, LLP
Attn: Chris A. Blackerby
Attorneys for Ford Motor Company
111 Congress Avenue, Suite 1400
Austin, Texas 78701-4043
(512) 479-9782
FAX (512) 479-1101

Marsha Milligan, Ch 7 Trustee
Address shown above

Ms. Debby Parker
2209 Morris Ranch Road
Fredericksburg, Texas 78624

Fred Coogan
Attorney for Lee Cumming
c/o Robert A. Desmuke,
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P.O. Box 3558
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(512) 329-6666
Fax (512) 327-4694

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CASE NO. 02-12022-FRM

JURY REQUESTED

IN RE: DEBORAH KAY PARKER

DEBORAH KAY PARKER,

PLAINTIFF

VS.

LEE EDWARD CUMMING, SOCIETY OF ST. VINCENT DE PAUL, CATHOLIC DIOCESE OF MIDLAND, TEXAS; JIM BASS FORD, MERCURY AUTOMOBILE COMPANY, AND JOE WILKINSON,

DEFENDANTS

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

1. Plaintiff is Deborah Kay Parker, Debtor in this case.

2. This Court has jurisdiction and venue, as this is a core proceeding pursuant to 28 USC 157. Pursuant to 28 USC 157(b)(5), Plaintiff requests this case be transferred to the United States District

Court for the Western District of Texas, Austin Division, for jury trial.

3. Defendant Lee Edward Cumming ("Cumming") is a resident of Midland, Texas, and may be served at his address of 1706 S. Camp, Midland, Texas 79701.

4. Defendant Society of St. Vincent De Paul, ("St. Vincent") Catholic Diocese of Midland, Texas, may be served with summons care of Sherry L. Cox, Resident Manager, Society of St. Vincent de Paul, 701 North Ft. Worth Street, Midland, Texas 79701.

5. Defendant Jim Bass Ford ("Bass Ford") is a resident of Tom Green County, Texas and may be served with summons care of John Bass, President, 2901 Sherwood Way, San Angelo, Texas 76902.

6. Defendant Mercury Automobile Company ("Mercury") is a wholly owned subsidiary of Ford Motor Company, with principal offices in Travis County, Texas, and may be served with summons care of Darryl Hazel, President, Mercury Automobile Company Division of Ford Motor Company, 16800 Executive Plaza Drive Dearborn, Michigan 48126.

7. Defendant Joe Wilkinson ("Dr. Wilkinson") is a resident of San Angelo, Texas and may be served with summons at 3555 Knickerbocker Road, San Angelo, Texas 76904.

8. This lawsuit results from an automobile accident that occurred on January 27, 2001 at 500 Block of South Big Spring Street (State Highway 349 South) in Midland, Texas. Plaintiff was driving her vehicle in a prudent manner when Defendant Cumming suddenly stopped, causing impact with his rear bumper by Plaintiff, and Defendant St. Vincent rear ended Plaintiff. As a result of the multiple impacts, and the other complaints set forth herein, plaintiff suffered serious and debilitating permanent injuries for which she now sues.

9. Prior to the accident on January 27, 2001, Plaintiff had been experiencing brake problems with her vehicle, a 2000 Mercury Sable. Plaintiff took her vehicle to Bass Ford on January 24, 2001, and requested repairs. When she returned to pick up her vehicle that evening, she was informed "no work" was done because someone had been sick. Plaintiff was a consumer in seeking this repair work.

10. At the time and place of the accident, Plaintiff's air bag failed to deploy, and her seat belt failed to restrain her forward motion, as a result of which she was violently thrown forward at the time of impact, and injured her neck, shoulder, and entire body. When she was rear ended by St Vincent, the seat collapsed backwards, further injuring her. Plaintiff was a consumer when she purchased her Mercury Sable automobile.

11. Subsequent to her accident, and sustaining injuries, Plaintiff's sought medical care from Dr. Wilkinson. Dr. Wilkinson checked on

Plaintiff and dismissed her as being "all right". Plaintiff, approximately two months later, because of continuing pain and problems, sought medical care from another Doctor, with the end result of Plaintiff being diagnosed with serious injuries caused by the automobile accident of January 27, 2001, for which she has had multiple surgeries, and incurred over $200,000 in medical bills.

12. Plaintiff sues all Defendants for her injuries, claiming joint and several liability in a proportionate degree of responsibility as determined by the trier of fact.

13. At the time of the accident, Defendant Cumming was operating his vehicle negligently in slowing or stopping too suddenly, and in failing to signal his intentions. Defendant Cumming is further negligent per se in violating Article 6701(d) Section 108, by removing the factory equipped energy absorbing bumper, and replacing it, or driving his vehicle with an "oil field bumper" of solid iron, which in effect turned his vehicle into a battering ram, and posed an unreasonable risk of harm to Plaintiff. Defendant had a duty to exercise ordinary care and operate his vehicle reasonably and prudently, and not to create an extra hazardous condition to other vehicles. Defendant breached that duty in one or more of the following ways:

a. Failing to timely apply his brakes.

b. Failing to maintain a proper lookout.

c. Failing to turn his vehicle to avoid the collision.

d. Driving his vehicle at a rate of speed that an ordinary and prudent person would not have driven under the same or similar circumstances.

e. Violating Article 6701d, V.A.T.S., Section 108, by operating his vehicle without factory installed, and legally mandated safety equipment, i.e., an energy absorbing bumper, which is negligence per se.

14. At the time and place of the accident Defendant St. Vincent was operating his vehicle negligently in failing to stop in time to avoid impact with Plaintiff. Defendant had a duty to exercise ordinary care and operate his vehicle reasonably and prudently. Defendant breached that duty in one or more of the following ways.

a. Failing to timely apply his brakes.

b. Failing to maintain a proper lookout.

c. Failing to turn his vehicle to avoid the collision.

d. Driving his vehicle at a rate of speed that an ordinary and prudent person would not have driven under the same or similar circumstances.

14. At the time and place of the accident, Plaintiff was unable to stop in time due to faulty

brakes on her 2000 Mercury Sable. Plaintiff sought repair work from Bass Ford which was negligently, and unreasonably not done. The inaction of Bass Ford violated Defendant's duty to Plaintiff, and contributed to her injuries in forcing Plaintiff to drive a vehicle with poor brakes. Although Plaintiff attempted to compensate for such conditions, she was unable to avoid the collision although she affirmatively alleges she was exercising all due care possible at the time and place of the accident. Plaintiff sues Bass Ford for negligence, breach of contract, and deceptive trade practices, in unreasonably failing to repair her brakes, or provide her with an alternative vehicle until repairs could be made.

15. At the time and place of the accident, Plaintiff's brakes, air bag, seat and seat belt failed to properly function to provide protection to Plaintiff from injuries. Defendant Mercury breached its duty to Plaintiff to provide a safe product, and a product with safety devices that operated as intended at the time of the accident. Plaintiff sues Mercury for products liability, negligence, breach of express and implied warranties, and deceptive trade practices in selling her a vehicle that was unreasonably dangerous under the conditions at the time of the accident, and on which the safety features designed to protect Plaintiff failed to properly operate, and failed to provide any protection from injury.

16. At the time of the accident, Plaintiff suffered pain and injury, for which she sought medical treatment from Dr. Wilkenson. Dr. Wilkenson failed to properly diagnose the nature

and extent of Plaintiff's injuries. Plaintiff sues for medical malpractice for failure to properly diagnose, and treat Plaintiff for the injuries she suffered on January 27, 2001 or during any continuing course of prior treatment if discovery reveals other negligence.

17. Plaintiff affirmatively pleads that she seeks monetary relief aggregating $2,000,000 or more as may be found by the trier of fact, excluding costs, prejudgment interest, and attorney fees.

18. Plaintiff's damages, which are unliquidated, are within the jurisdictional limits of the court.

19. Plaintiff sues Defendants jointly and severally, for negligence, and other causes of action as plead hereinabove, as the conduct of Defendants was a proximate cause of Plaintiff's injuries to her neck, shoulder, and entire body. As a result of plaintiff's injuries, plaintiff suffered the following damages:

a. Physical pain and mental anguish in the past and future.

b. Lost earnings.

c. Damage to earning capacity.

d. Disfigurement in the past and future.

e. Physical impairment in the past and future.

f. Medical expenses in the past and future.

g. Los of consortium in the future.

h. Loss of household services in the past and future.

i. Property damage.

20. Plaintiff requests a jury trial, and requests the Court to transfer this case to District Court, pursuant to 28 USC 157 (b)(5) to the District Court where the bankruptcy is pending.

21. WHEREFORE, PREMISES CONSIDERED, Plaintiff asks that Defendants be summoned to appear and answer and that plaintiff have judgment against defendants, jointly and severally, in such proportions as may be determined by the jury, for the following:

a. Actual damages within the jurisdictional limits of this court.

b. Prejudgment and post-judgment interest as allowed by law.

c. Costs of Suit.

d. All other relief, in law and in equity, to which plaintiff may be entitled.

Respectfully submitted.
/s/ James R. Chapman, Jr.
James R. Chapman, Jr. 04134700
Attorney for Plaintiff
Special Counsel to Trustee
P.O. Box 841
Fredericksburg, TX 78624
(830) 997-3269 No Fax

Copy to:

Marsha Milligan, Chapter 7 Trustee
P.O. Box 92408
Austin Tx 78709-2408
(512) 494-1077 x 203

VERIFICATION

ON THIS DAY, personally appeared Deborah Kaye Parker, Plaintiff, and who, identified by me, the undersigned Notary Public by TDL 05861246, after being duly sworn, deposed and said:

"My name is Deborah Kaye Parker, and I am Plaintiff in this suit. I have read the above and foregoing Plaintiff's Original Complaint, and it is true and correct to the best of my knowledge and belief".

/s/ Deborah Kaye Parker
Deborah Kaye Parker, Plaintiff

To certify which witness my hand and seal of office this 23 day of January, 2003.

/s/ Shanese Tatsch
Notary Public

B 104 (Rev. 2/92) **ADVERSARY PROCEEDING COVER SHEET** (Instructions on Reverse)	Adversary Proceedings Number (Court Use Only) 03-1019 FM

PLAINTIFFS Deborah Kaye Parker 5 Sum Iss.	**DEFENDANTS** Lee Edward Cumming Society of St. Vincent De Paul, Catholic Diocese of Midland, Texas Jim Bass Ford Mercury Automobile Company Joe Wilkinson
ATTORNEYS (Firm Name, Address, and Telephone No.) James R. Chapman, Jr. (830) 997-3269 PO Box 841 Fredericksburg, TX 78624	**ATTORNEYS** (If Known)

PARTY (Check one box only)

_1 U.S. PLAINTIFF _ 2 U.S. DEFENDANT
X 3. U.S. NOT A PARTY

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

Complaint seeking monetary relief from negligence, and other causes of action, Article 6701(d), Section 108,

NATURE OF SUIT
(Check the one most appropriate box only)

X 454 To Recover Money or Property
__ 435 To Determine Validity, Priority, or Extent of a Lien or Other Interest in Property
__ 458 To obtain approval for the sale of both the interest of the estate and of a co-owner in property
__ 424 To object or to revoke a discharge 11 U.S.C. §727
__ 455 To revoke an order of confirmation of a Chap. 11, Chap. 12, or Chap. 13 Plan
__ 426 To determine the dischargeability of a debt 11 U.S.C. §523
__ 434 To obtain an injunction or other equitable relief.
__ 457 To subordinate any allowed claim or interest except where such subordination is provided in a plan
__ 458 To obtain a declaratory judgment relating to any of foregoing causes of action
__ 459 To determine a claim or cause of action removed to a bankruptcy court
__ 498 Other (specify)

ORIGIN OF PROCEEDINGS
(Check one box only)
1 Original Proceeding 2 Removed Proceeding
3 Reinstated or Reopened 5 Transferred from Another Bankruptcy Court
__ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND	NEAREST THOUSAND $2000	OTHER RELIEF SOUGHT	X JURY DEMAND

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Deborah Kaye Parker	BANKRUPTCY CASE NO. 02-12022-FRM	
DISTRICT IN WHICH CASE IS PENDING Western	DIVISIONAL OFFICE Austin	NAME OF JUDGE
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	**DEFENDANT**	**ADVERSARY PROCEEDING NO**
DISTRICT	**DIVISIONAL OFFICE**	**NAME OF JUDGE**
FILING FEE (Check one box only) __ FEE ATTACHED **X** FEE NOT REQUIRED __ FEE IS DEFERRED		
DATE 1/24/03	**PRINT NAME** James R. Chapman, Jr.	**SIGNATURE OF ATTORNEY (OR PLAINTIFF)** /s/ James R. Chapman, Jr.